SUPREME COURT, U.S.
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No. 92-963

In the Supreme Court of the United States

OCTOBER TERM, 1992

JOSEPH R. MIX, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the inquiry conducted by the trial judge before allowing petitioner to proceed pro se established that petitioner knowingly and intelligently waived his right to the assistance of counsel.

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OPINIONS BELOW

The opinion of the Court of Military Appeals, Pet. App. 1a-15a, is reported at 35 M.J. 283. The opinion of the Army Court of Military Review, Pet. App. 20a-38a, is reported at 32 M.J. 974. An interlocutory opinion of the Army Court of Military Review, Pet. App. 16a-19a, is reported at 29 M.J. 956.

JURISDICTION

The judgment of the Court of Military Appeals was entered on September 24, 1992. The petition for a writ of certiorari was filed on December 7, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1259(3).

STATEMENT

Following a general court-martial, petitioner was convicted of conspiracy to commit larceny, three specifications of desertion, violation of a general regulation by failing to store arms and ammunition properly, two specifications of escape from confinement, destruction of government property, destruction of private property, larceny, arson of the building that housed the Fort Campbell legal offices and courtroom, housebreaking, and breaking restriction, in violation of Articles 81, 85, 92, 95, 108, 109, 121, 126, 130, and 134 of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. 881, 885, 892, 895, 908, 909, 921, 926, 930, and 934. Pet. App. 20a-21a. Petitioner was sentenced to confinement for 25 years, reduction to the lowest enlisted rank, forfeiture of all pay and allowances, and a dishonorable discharge. The convening authority approved the sentence. The Army Court of Military Review affirmed the conviction and sentence. The Court of Military Appeals affirmed.

1. The Uniform Code of Military Justice, 10 U.S.C. 801 *et seq.*, establishes a comprehensive scheme of military tribunals. A military judge presides over trial courts, or courts-martial, and cases are tried to a panel of court members, who function like jurors in the civilian criminal justice system. See Arts. 25 and 26, UCMJ, 10 U.S.C. 825 and 826. If convicted by court-martial, the defendant can appeal to the appropriate court of military review. Art. 66, UCMJ, 10 U.S.C. 866. The courts of military review are established by the Judge Advocate General of each service (Army, Navy-Marine Corps, Air Force, and Coast Guard). Arts. 1(1) and 66(a), UCMJ, 10 U.S.C.

801(1) and 866(a). Decisions of the courts of military review are reviewed by the Court of Military Appeals, an Article I court consisting of civilian judges. Art. 67(a), UCMJ, 10 U.S.C. 867(a). The Court of Military Appeals must hear cases involving a sentence of death and cases ordered reviewed by a Judge Advocate General; in all other matters the court's review is discretionary. Art. 67(b), UCMJ, 10 U.S.C. 867(b). This Court has had certiorari jurisdiction over decisions of the Court of Military Appeals since 1984. 28 U.S.C. 1259; see Military Justice Act of 1983, Pub. L. No. 98-209, 97 Stat. 1393.

The courts-martial and military appellate courts follow military rules of procedure and evidence. See generally *Manual for Courts-Martial, United States —1984* (*Manual*). A defendant has the right to be represented at a general court-martial by military counsel detailed to him by the government; by military counsel of the defendant's choice, if such counsel is reasonably available; or by civilian counsel if such counsel is provided at no cost to the government. See Rule for Courts-Martial 506(a). Rule 506(d) of the Rules for Courts-Martial provides for an accused to waive his right to counsel under the following circumstances:

> The accused may expressly waive the right to be represented by counsel and may thereafter conduct the defense personally. Such waiver shall be accepted by the military judge only if the military judge finds that the accused is competent to understand the disadvantages of self-representation and that the waiver is voluntary and understanding. The military judge may require

> that a defense counsel remain present even if the accused waives counsel and conducts the defense personally. The right of the accused to conduct the defense personally may be revoked if the accused is disruptive or fails to follow basic rules of decorum and procedure.

Rule 506(d) codifies this Court's decision in *Faretta* v. *California*, 422 U.S. 806 (1975). See *Manual* A21-27. In *Faretta*, this Court framed the constitutional inquiry as follows:

> When an accused manages his own defense, he relinquishes, as a purely factual matter, many of the traditional benefits associated with the right to counsel. For this reason, in order to represent himself, the accused must "knowingly and intelligently" forgo those relinquished benefits. Although a defendant need not himself have the skill and experience of a lawyer in order competently and intelligently to choose self-representation, he should be made aware of the dangers and disadvantages of self-representation, so that the record will establish that "he knows what he is doing and his choice is made with eyes open."

422 U.S. at 835 (citations omitted); see also *id.* at 834-835 n.46 (noting that a trial judge could order "standby counsel" to aid in the defense and terminate self-representation for disrupting the proceedings).

2. a. Before trial, petitioner was represented by detailed counsel, Captain Best. Pet. App. 22a; Gov't C.M.A. Br. 14. At a pretrial hearing before the trial

judge,[1] petitioner asked to be represented by a specific attorney, Major Arnold, and he further asked that Captain Best be allowed to remain on the case to assist Major Arnold. Pet. App. 22a; Gov't C.M.A. Br. 14. The trial judge directed that Major Arnold be appointed to represent petitioner along with Captain Best. Pet. App. 22a. The judge then advised petitioner again of his right to counsel. Pet. App. 23a.

At that time petitioner expressed his desire to be represented by his uncle, an attorney in California. Pet. App. 3a, 22a-23a. Petitioner's military counsel contacted the uncle, who said that he did not have a criminal practice and had no interest in representing petitioner. Pet. App. 23a. Petitioner told the trial judge: "If I can't get my uncle, I don't want a lawyer." *Ibid.* The trial judge informed petitioner that he had a right to defend himself, but pointed out the numerous problems with taking that course. See Pet. App. 23a-24a.

Petitioner then asked to speak with his uncle personally; the uncle confirmed that he would not represent petitioner. Pet. App. 24a-25a. Petitioner advised the trial judge that he would keep his current attorneys, and he did so throughout the pretrial proceedings. Pet. App. 25a. Immediately before trial, however, petitioner announced his intention to represent himself. *Ibid.* The trial judge then engaged in a long colloquy with petitioner about the hazards of defending himself. Pet. App. 25a-30a. Because

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[1] Art. 39(a), UCMJ, 10 U.S.C. 839(a), provides for a pretrial hearing, outside the presence of the court members, to resolve motions and other preliminary matters.

petitioner repeatedly indicated that he wished to conduct his own defense, the trial judge granted his request to proceed pro se. Pet. App. 29a.

b. The Army Court of Military Review affirmed. Pet. App. 20a-38a. The court concluded that the trial judge properly allowed petitioner to defend himself, Pet. App. 34a-35a:

> The military judge repeatedly questioned [petitioner] about his desire and intent. He advised [petitioner] on several occasions about the benefits of having a lawyer. He also advised him of the dangers of representing himself * * *. The military judge called [petitioner's] attention to the fact that he would be at a great disadvantage because the government would be represented by a lawyer. Despite this counseling, [petitioner] clearly continued his request to represent himself.

c. The Court of Military Appeals granted review of petitioner's claim that the military judge erred in allowing him to represent himself.[2] Pet. App. 2a. The court affirmed, finding that petitioner's waiver of counsel was knowing and intelligent "because the judge advised [petitioner] on several occasions of the benefits of a lawyer and the disadvantages of representing oneself, specifically as to the rules of evidence, cross-examination, arguments, and voir dire." Pet. App. 6a.

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[2] The court also granted review of three other issues that are not involved in this petition. Pet. App. 7a-12a.

ARGUMENT

Petitioner claims that the Court of Military Appeals erred in finding that he knowingly and intelligently waived his right to counsel.

1. The Sixth Amendment does not require any specific procedures in the trial court to ensure that a defendant is sufficiently apprised of the risks of proceeding pro se. See *Patterson* v. *Illinois*, 487 U.S. 285, 298 (1988) ("[this Court has] taken a more pragmatic approach to the waiver question * * * to determine the scope of the Sixth Amendment right to counsel, and the type of warnings and procedures that should be required before a waiver of that right will be recognized"); cf. *Cuyler* v. *Sullivan*, 446 U.S. 335, 346-347 (1980). In formulating a standard for a valid waiver of counsel, this Court has held that the court's only duty is to ensure that the choice is voluntarily made and that the decision is knowing and intelligent. *Faretta* v. *California*, 422 U.S. 806, 835 (1975); see also *Carnley* v. *Cochran*, 369 U.S. 506, 516 (1962); *Johnson* v. *Zerbst*, 304 U.S. 458, 464 (1938).

A knowing and intelligent waiver of the right to counsel requires that the defendant somehow be made aware of the pitfalls awaiting him. "So long as the accused is made aware of the 'dangers and disadvantages of self-representation' " at trial, "his waiver of his Sixth Amendment right to counsel at [trial] is 'knowing and intelligent.' " *Patterson* v. *Illinois*, 487 U.S. at 299-300.[3] Exercising their super-

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[3] *Patterson* involved the right to assistance of counsel at postindictment questioning. The Court made clear, however, that this "pragmatic approach" to Sixth Amendment waiver questions applies to all criminal proceedings. A defendant who

visory powers to enable effective appellate review, cf. *Thomas* v. *Arn*, 474 U.S. 140, 146-147 (1985); *Cuyler* v. *Sullivan*, 446 U.S. at 346 n.10, the courts of appeals have required the district courts to follow certain procedures to ensure that an adequate record is made in the district court of the defendant's being warned of the "dangers and disadvantages of self-representation." While those requirements vary somewhat depending on each court's judgment as to the procedures that will best facilitate appellate review, see *McDowell* v. *United States*, 484 U.S. 980 (1987) (White, J., dissenting from denial of certiorari), inter-circuit differences in matters of supervisory authority do not warrant plenary review by this Court. See *Thomas* v. *Arn*, 474 U.S. at 157 (Stevens, J., dissenting).

In any event, the Court of Military Appeals' decision dispelled any uncertainty on this score in the military courts, which operate separately from the federal courts of appeals. The Court of Military Appeals, in an exercise of its supervisory authority, set forth in an appendix to its opinion a comprehensive list of 17 questions for courts-martial to follow in future cases involving an accused's waiver of the right to counsel. Pet. App. 12a-14a.[4] The Court of

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is aware of the "dangers and disadvantages of self-representation" at the particular proceeding can knowingly waive the right to counsel at that proceeding. See 487 U.S. at 298.

[4] The court's colloquy is based on 1 *Bench Book for United States District Judges* §§ 1.02-2 to 1.02-5 (1991), an earlier version of which was cited with apparent approval by this Court in *Patterson* v. *Illinois*, 487 U.S. at 299 n.13. See also *United States* v. *McDowell*, 814 F.2d 245, 251-252 (6th Cir.)

Military Appeals is the highest court in the military justice system, *Burns* v. *Wilson*, 346 U.S. 137, 141 n.7 (1953), subject only to review in this Court by writ of certiorari. Its decisions are binding on lower military courts. *United States* v. *Armbruster*, 29 C.M.R. 412, 414 (C.M.A. 1960); cf. Art. 76, UCMJ, 10 U.S.C. 876. The opinion in this case is thus controlling in every court-martial and court of military review in the military justice system.[5] Because the court primarily charged with overseeing the military justice system has adopted a uniform procedural rule for waiver of counsel at courts-martial, further review in this Court is not warranted.

2. Although no specific procedure is required in the trial court, "[t]he record must show, or there must be an allegation and evidence which show, that an accused was offered counsel but intelligently and understandingly rejected the offer." *Carnley* v. *Cochran*, 369 U.S. at 516; see also *Patterson* v. *Illinois*, 487 U.S. at 298 ("[a]n accused's waiver of his right to counsel is 'knowing' when he is made aware of [the usefulness of counsel and the dangers of proceeding without counsel]"). Petitioner mistakenly

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(adopting a similar set of questions for district courts within the Sixth Circuit), cert. denied, 484 U.S. 980 (1987); *United States* v. *Bailey*, 675 F.2d 1292, 1300 (D.C. Cir.) (requiring a set colloquy for district courts within the D.C. Circuit), cert. denied, 459 U.S. 853 (1982).

[5] Petitioner's claim that the court failed to "provid[e] necessary guidance to the military Courts of Review," Pet. 9, is therefore incorrect. And petitioner is likewise incorrect in stating, Pet. 9, that different standards for waiver of counsel apply after the decision in this case depending upon the service in which the court-martial takes place.

suggests, Pet. 9-11, that the Court of Military Appeals erred in finding his waiver valid. To the contrary, the record in this case amply demonstrates a knowing and intelligent waiver of the right to counsel, as all three courts below found.[6]

After petitioner announced, "I don't want any lawyers," and stated unequivocally that he intended to defend himself, the trial judge told petitioner that he would be held to the standards of a lawyer, that he would have to have someone ask him questions if he desired to testify, and that petitioner would have to conduct voir dire himself. Pet. App. 25a. The judge told petitioner that Major Arnold and Captain Best would remain available to advise him on matters of law and procedure. Pet. App. 26a. Petitioner stated that he did not want Major Arnold and Captain Best to

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[6] The record also demonstrates that petitioner unequivocally and repeatedly rejected his appointed military counsel. See Gov't C.M.A. Br. 14-15; Pet. App. 26a ("I don't want [Major Arnold and Captain Best] anywhere around me."). The courts of appeals have consistently held that a defendant who fails to accept appointed counsel may be deemed to have waived the right to counsel. See, *e.g.*, *United States* v. *Fazzini*, 871 F.2d 635, 641-642 (7th Cir.) (defendant's refusal to cooperate with four successive appointed attorneys constituted waiver of right to counsel), cert. denied, 493 U.S. 982 (1989); *United States* v. *Kelm*, 827 F.2d 1319, 1322 (9th Cir. 1987) (defendant's persistent refusal to accept appointed counsel constituted implied waiver of right to counsel); *United States* v. *Schmitt*, 784 F.2d 880, 882 (8th Cir. 1986) (defendant's refusal to rely on appointed counsel constituted waiver of right to counsel); *United States* v. *Moore*, 706 F.2d 538, 538-540 (5th Cir.) (defendant's repeated rejection of appointed attorneys was a waiver of right to counsel), cert. denied, 464 U.S. 859 (1983).

advise him on such matters, and that he wanted a different lawyer to advise him. Pet. App. 26a-27a. The trial judge was careful to clarify petitioner's request to ensure that petitioner's desire was to have a different lawyer sit at his table to advise him on legal and procedural matters, rather than to have a different lawyer actually represent him. Petitioner reaffirmed his desire to represent himself. *Ibid.* The trial judge granted petitioner's request that Captain Lauer be assigned to advise him on matters of law and procedure. Gov't C.M.A. Br. 3.

The trial judge then instructed petitioner on the pitfalls and disadvantages of self-representation. The judge informed him that the government would be represented by, and would present its evidence through, an attorney. Pet. App. 27a. He warned petitioner that he was "facing potential confinement" if convicted. *Ibid.* He told petitioner that being represented by "a lawyer is the best way to defend yourself." *Ibid.* The judge also cautioned petitioner that, should he become disruptive, he would be removed from the courtroom and the trial would continue. Pet. App. 28a. The judge directed Major Arnold and Captain Best to remain in the courtroom throughout the trial, as they would be expected to assume the defense if petitioner became disruptive and was removed. See Gov't C.M.A. Br. 3 n.1.

After satisfying himself that petitioner's request to proceed pro se was knowing and intelligent, the judge granted the request. Pet. App. 29a ("I'm going to allow you to defend yourself, because you have that right."). The judge advised petitioner that if at any time he changed his mind concerning his decision to

represent himself, he should bring the matter to the judge's attention. Tr. 273. He also reminded petitioner that Major Arnold and Captain Best would be in the courtroom, keeping abreast of the case, in the event petitioner wished them to resume his defense. *Ibid.*

Immediately preceding voir dire of the court members, the trial judge engaged petitioner in the following colloquy, Tr. 287-288:

MJ [military judge]: Okay, is it still your desire to continue to represent yourself?

ACC [accused]: Uh-huh.

MJ: Do you understand what you are doing?

ACC: Yes.

MJ: Now, do you understand that you are going to have to address the court, and you are going to have to do the questioning rather than Captain Lauer?

ACC: Uh-huh.

MJ: You are sure you want to do that?

ACC: Yes.

MJ: Pardon?

ACC: Yes, sir.

MJ: Okay, so you—and you understand the pitfalls? In other words the dangers that you are running into?

ACC: Yes.

MJ: And you still want to continue forward on that course?

ACC: Yes.

There is no doubt on this record that petitioner knowingly and intelligently waived his right to the assistance of counsel, and that he did so cognizant of the risks involved. Each of the factors on which this Court relied in *Faretta* in concluding that Faretta himself was sufficiently aware of the dangers and disadvantages of self-representation is also present here. See 422 U.S. at 835-836. Before allowing petitioner to represent himself, the trial judge expressly informed him that he had the right to appointed counsel. The judge also made clear that petitioner would be required to follow applicable procedures. In addition, the judge repeatedly indicated to petitioner that he was making a mistake by proceeding pro se. The courts below were therefore correct in finding that petitioner made the decision to defend himself at trial "with [his] eyes open" in a manner consistent with *Faretta*. 422 U.S. at 835.

That conclusion is confirmed by "the particular facts and circumstances surrounding [this] case, including the background, experience, and conduct of the accused." *Johnson* v. *Zerbst*, 304 U.S. at 464; see *Maynard* v. *Meachum*, 545 F.2d 273, 279 (1st Cir. 1976) (proper considerations "in determining whether the [defendant] understood what he was getting into" include the defendant's "involvement in previous criminal trials, his representation by counsel before trial, and the continued presence of advisory counsel

at trial"). Petitioner had previously been convicted in Kentucky state court on five counts of unlawful transactions with a minor. Tr. 915; GX 58. Petitioner fully participated, with the assistance of counsel, in the pretrial investigative hearing, at which he was able to familiarize himself with many of the practices and procedures that would later be used at his trial.[7] Petitioner had a military defense attorney by his side throughout his court-martial, upon whom he could (and did) rely for advice.

This Court has recognized that, although "in most criminal prosecutions defendants could better defend with counsel's guidance than by their own unskilled efforts[,] * * * [t]o force a lawyer on a defendant can only lead him to believe that the law contrives against him." *Faretta* v. *California*, 422 U.S. at 834. Petitioner repeatedly voiced his mistrust of lawyers. See Pet. App. 24a, 25a, 26a, 27a, 29a. Indeed, one of the crimes of which petitioner was convicted was destroying by fire the office building in which the staff judge advocate's office was located. See Gov't C.M.A. Br. 2-3, 4 n.2. The trial judge, by declining to "force a lawyer on [petitioner]," Pet. App. 23a, simply recognized petitioner's right to represent himself.

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[7] Art. 32, UCMJ, 10 U.S.C. 832, provides that no charges can be referred to a general court-martial until there has been a thorough and impartial hearing on all matters set forth in the charges. An Article 32 hearing is similar to a preliminary hearing conducted in the civilian criminal justice system to determine whether there is probable cause to hold a defendant for trial. The accused, who has the right to be represented by counsel, is advised of the charges against him, has the opportunity to cross-examine witnesses, and can present evidence in his own behalf. See generally Rule for Courts-Martial 405.

See *Faretta* v. *California*, 422 U.S. at 820 ("To thrust counsel upon the accused, against his considered wish, * * * violates the logic of the [Sixth] Amendment.").

In sum, the record shows, and the courts below correctly concluded, that petitioner's decision to waive the assistance of counsel was knowing and intelligent. Petitioner's claim therefore warrants no further review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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